Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1264

SHIRLEY HAAS, individually and as Executrix under the Last Will and Testament of DANIEL HAAS, Deceased,

Petitioner,

vs.

MANUFACTURERS HANOVER TRUST CO., as Trustee of the Pension Fund of LANE BRYANT, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Shirley Haas, individually and as Executrix under the Last Will and Testament of Daniel Haas, Deceased, respectfully prays that a writ of certiorari

issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 3, 1979.

OPINIONS BELOW

The oral opinion of the United States Court of Appeals, for the Second Circuit, appears in the Appendix hereto at page 1a. The opinion and order of the District Court (Lasker, D.J.) appear at page 7a of the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit is dated December 3, 1979 and was entered on said date. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the courts belowed erred in holding that the prior state court decision rendered prior to the applicability of ERISA was res judicata to the present action where the present action is based on the adoption of the provisions of ERISA, creating an altered situation, new rights and a change in the law.

2. Whether the courts below erred in failing to hold that the employee who worked for 50 years for his employer and was 65 years of age had a vested nonforfeitable interest to 100% of his accrued benefits from employer contributions based on section 1053(a)(2)(A), Title 29 U.S.C.

3. Whether the courts below erred in failing to hold that the adoption of ERISA by the employer effective as of February 1, 1976 did not reduce the accrued benefits of the

participant employee determined as of February 1, 1976.

4. Whether the courts below erred in holding that Congress did not intend ERISA's provisions to become retroactively effective as soon as a pension plan was amended to conform to ERISA's requirements, where section 1053(a)(3)(C), Title 29 U.S.C., specifically states as follows:

> "(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan amendments may be given retroactive application as provided in section 1082(c)(8) of this title. (supra); "

and where a similar provision appears in section 411(a)(3)(C), Title 26 U.S.C.

5. Whether the courts below erred in failing to hold that a plan amendment changing any vesting schedule under the plan is ineffectual and permits an election to have the nonforfeitable percentage computed under the

plan without regard to such amendment under section 1053(c)(1)(A) and (B), Title 29, U.S.C.

6. Whether it was error to grant defendant's motion for summary judgment dismissing the complaint, and deny plaintiff's cross-motion for summary judgment.

STATUTORY PROVISIONS INVOLVED

In respect to Part 2 (sections 1051 through 1061) of Title 29 U.S.C., which treats with Participation and Vesting, section 1061 in respect to effective dates, states in part as follows:

> "§1061. Effective dates.
>
> (a) Except as otherwise provided in this section, this part shall apply in the case of plan years beginning after September 2, 1974.
>
> * * *
>
> (2) Except as otherwise provided in subsections (c) and (d) of this section in the case of a plan in existence on January 1, 1974, this part shall apply in the case of plan years beginning after December 31,1975."

§1053(a)(3), Title 29 U.S.C. and

§411 (a)(3)Title 26 U.S.C., read as follows:

> "A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in Section 1055 of this title" (or as provided in Section 401(a)(11).

§1002(19), Title 29 U.S.C., states:

> "(19) The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053 (a)(3) of this title."

§1002, Title 29 U.S.C., states in part as follows:

> "(6) the term 'employee' means any individual employed by an employer.
>
> (7) The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.
>
> (8) The term 'beneficiary' means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."

§1053, Title 29 U.S.C., provides in part:

> "§1053. Minimum vesting standards
>
> (a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.
>
> (1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued bene-

fit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (a), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Years of service	Nonforfeitable percentage
5	25
6	30
7	35
8	40
9	45
10	50
11	60
12	70
13	80
14	90
15 or more	100.

(C) (i) A plan satisfies the requirements of this subparagraph if a participant who is not separated from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed—	and sum of age and service equals or exceeds—	then the nonforfeitable percentage is—
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter. "

In respect to retroactive effect, it is specifically provided by Titles 29 and 26, as follows:

§1053(a)(3)(C), Title 29 U.S.C., provides:

> "(C) A right to an accrued benefit from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(c)(8) of this title."

A similar provision appears in the Income Tax Law, §411(a)(3)(C), Title 26 U.S.C., which reads as follows:

> "(C) Effect of Retroactive Plan Amendments.
> A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in Section 412(c)(8). "

§1082(c)(8), Title 29 U.S.C., treating with Funding states, in part:

> "(8) For purposes of this part, any amendment applying to a plan year which —
>
> (A) is adopted after the close of such plan year but no later than

> 2-1/2 months after the close of the plan year (or, in the case of a multi-employer plan, no later than 2 years after the close of such plan year),
>
> (B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and
>
> (C) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances,
>
> shall, at the election of the plan administrator, be deemed to have been made on the first day of such plan year. No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved such amendment or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment. No amendment described in this subsection shall be approved by the Secretary unless he determines that such amendment is necessary because of a substantial business hardship (as determined under section 1083(b) of this title) and that waiver under section 1083(a) of this title is unavailable or inadequate. "

Similar provisions appear under Title 26, §411 U.S.C., dealing with the Income Tax Law.

§1053(c)(1)(A) and (B), Title 29 U.S.C. provides:

"(c)(1)(A) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) of this section if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment.

(B) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) of this section unless each participant having not less than 5 years of service is permitted to elect, within a reasonable period after adoption of such amendment, to have his nonforfeitable percentage computed under the plan without regard to such amendment.

(2) Subsection (a) of this section shall not apply to benefits which may not be provided for designated employees

in the event of early termination of the plan under provisions of the plan adopted pursuant to regulations prescribed by the Secretary of the Treasury to preclude the discrimination prohibited by section 401(a)(4) of Title 26.

(3) The requirements of subsection (a)(2) of this section shall be deemed to be satisfied in the case of a class year plan if such plan provides that 100 percent of each employee's right to or derived from the contributions of the employer on his behalf with respect to any plan year are nonforfeitable not later than the end of the 5th plan year following the plan year for which such contributions were made. For purposes of this part, the term 'class year plan' means a profit sharing, stock bonus, or money purchase plan which provides for the separate nonforfeitability of employees' rights to or derived from the contributions for each plan year.

(d) A pension plan may allow for nonforfeitable benefits after a lesser period and in greater amounts than are required by this part. "

Similar provisions appear in §411, Title 26 U.S.C.

§1002(7) of Title 29 U.S.C. defines "participant" in part as follows:

> "The term 'participant' means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit."

In that regard, the Amended Plan follows the statute and defines "participant" as follows:

> "F. Participant: A person or former employee who has completed a year of service and who: . . . (b) has vested rights to an accrued benefit, or . . . "

STATEMENT OF THE CASE

Plaintiff-petitioner is the wife off Daniel Haas, who was employed from 1925 to 1975 by Lane Bryant, Inc., a Delaware corporation authorized to do business, and doing business, in the State of New York and in many other states. Daniel Haas, her husband, had been the head shoe buyer of Lane Bryant, Inc., for many years and had been continuously in the employ of Lane Bryant, Inc. since October, 1925, for approximately 50 years, and became 65 years old on August 16, 1975. Lane Bryant, Inc. requested him to retire and in accordance with said request, her husband, on or about September 16, 1975, filed with the then Trustees of the Pension Plan of Lane Bryant, Inc., an optional method of pension payment under the Pension Plan then in effect, which provided for a reduced pension to be received by him of ap-

proximately $5,485.96 per annum, and in the event of his death, that the total amount of $66,476.50, less the total pension payments received by him prior to his death, would be paid to plaintiff, his wife, the designated beneficiary. Her husband designated his retirement date as of January 31, 1976.

Lane Bryant's Pension Plan, which was to insure stability of employment and the successful development of industrial and labor relations, was established by Lane Bryant, Inc., and its numerous affiliate corporate entities in 1942.

On November 17, 1975, Daniel Haas died and plaintiff was appointed Executrix of his estate on January 12, 1976 by the Surrogate's Court, Kings County.

As beneficiary under the Pension Plan, plaintiff demanded payment of the pension benefits in the said sum of $66,476.50 from the

then Trustee of the Pension Plan, who refused payment, relying on the then Article XII of the Pension Plan, which read as follows:

> "No benefits of the pension plan shall be available to any employee or to any beneficiary designated under the optional method of payment, in case of termination of service or death of such employee before the employee has retired."

Since payment was refused, plaintiff commenced an action on July 15, 1976 against the then Trustees of the Pension Plan of Lane Bryant, Inc., in the Supreme Court, Kings County, to recover the said benefits, claiming, among other things, that the provisions of ERISA applied to her case. Defendants contended that ERISA did not apply.

Defendants moved for summary judgment dismissing the complaint, which was granted on March 1, 1977 by Justice Brownstein. Justice Brownstein decided that ERISA did not apply since

the vesting provisions under ERISA became effective in this case for the plan years after December 31, 1975 or February 1, 1976, R.A.-48; and that inasmuch as her husband died before his retirement date and before February 1,1976, the foregoing provisions of Article XII applied, defeating her rights. This was affirmed by the Appellate Division, Second Department, and leave to appeal to the Court of Appeals was denied on March 28, 1978.

Plaintiff thereafter learned that Lane Bryant, Inc. had filed an Amended Plan adopting all of the terms and provisions of ERISA R.A.-122-A173. Plaintiff's attorney was able to obtain a copy of the Amended Pension Plan of Lane Bryant, Inc. under the provisions of ERISA.

It thus clearly appears that plaintiff's late husband, Daniel Haas, who had been an employee of Lane Bryant, Inc. for 50 years and who was 65 years of age, worked for the firm until

he died on November 17, 1975, before his designated retirement date of January 31, 1976. ERISA was signed into law on September 2, 1974, and as soon as defendant or Lane Bryant, Inc. adopted the provisions of ERISA, new rights, came into being in plaintiff's favor, as his beneficiary.

Although defendant claimed that Lane Bryant, Inc. never made an election to adopt ERISA, this contention is groundless for the reason that the defendant admits in the affidavit submitted by Mr. Brachfeld, under his Paragraph 3, page 2, and Paragraph 12, page 4, that Lane Bryant, Inc. adopted a Pension Plan including amendments required by the Internal Revenue Code, as amended by ERISA, pursuant to a Resolution of the Board of Directors of Lane Bryant, Inc., in December, 1976, which Amended Plan was submitted to the Internal Revenue Service for approval in February, 1977 and approved by Internal Revenue Service on May 31, 1977 R.-A-52.

Lane Bryant Inc. had to comply with the terms and provisions of ERISA by the commencement of its fiscal year no later than February 1, 1976, which thus granted the plan an exemption from taxes under the Internal Revenue Code. As a matter of fact, the very first page of the Amended Plan of Lane Bryant, Inc. states as follows:

> "The Plan and Trust are intended to meet the requirements of Sections 401(a) and 501(a) of the Internal Revenue Code of 1954, as amended by the Employee Retirement Income Security Act of 1974 ("ERISA"). R.A-124

Having adopted the Amended Pension Plan under the terms and provisions of ERISA, the defendant voluntarily came under its terms and provisions and the Internal Revenue Code, which granted and conferred upon plaintiff new rights, as well as any and all participants in the Pension Plan having rights of retirement, both after and prior to February 1, 1976, since,

among other things, ERISA's provisions were specifically made retroactive.

Under the terms and provisions of ERISA, Article XII of the former Plan treating with death of an employee before retirement R.A-30 was eliminated from the Amended Plan, and an employee who had 10 years of service or where age and service equalled or exceeded 55, as Daniel Haas had in this case, had a vested non-forfeitable interest to 100% of his accrued benefits derived from employer contributions, which was made retroactive and could not be changed in any way by amendment.

Judge Lasker erroneously held that (R.A-175-A178) Justice Brownstein's decision was res judicata and that Congress did not intend to give retroactive effect to the case at bar. Judge Lasker also failed to apply the several other relevant provisions of ERISA

which provide that an amendment changing any vesting schedule under the plan is without effect §1053(c)1)(A), Title 29 U.S.C. The United States Court of Appeals for the Second Circuit by oral opinion, Appendix 1a, held that Mr. Haas did not acquire any vested rights and affirmed substantially for the reasons of Judge Lasker.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE PROPER INTERPRETATION OF THE PROVISIONS OF ERISA, THE INTENT OF CONGRESS AND THE DECISION OF THE UNITED STATES SUPREME COURT IN STATE FARM INS. CO. v. DUEL, 324 U.S. 154, 162.

In this proceeding, petitioner seeks a writ of certiorari to reverse the judgment of the United States Court of Appeals for the Second Circuit, which affirmed the decision and order of Hon. Morris E. Lasker, U.S.D.J., which granted defendant's motion for summary judgment dismissing the complaint and denied plaintiff's cross-motion for summary judgment.

The application for certiorari herein involves the terms and provisions of the Employee Retirement Income Security Act of 1974 (ERISA), the intent of Congress in the enactment of certain provisions regarding vested

interests of an employee or participant, and the retroactive effect to be given thereto.

The district court held that Congress had no intent to grant retroactive application to the factual situation herein although it is respectfully submitted that such intent was clearly expressed by Congress.

The district court erred in failing to follow section 1053(c)(1)(A) and (B), Title 29 U.S.C., which prohibits a plan amendment changing any vesting schedule.

The district court also erred in holding that the prior state court decision was res judicata in respect to this action which was brought under a changed legal position, creating new rights in favor of plaintiff.

The United States Court of Appeals for the Second Circuit affirmed the order of the district court substantially for the reasons stated by the district court.

The United States Court of Appeals rendered an oral opinion immediately after argument (Appendix 1a).

The court below expressed sympathy for plaintiff's position, stating it was "most unfortunate". It is submitted that plaintiff did not come before the court below to get sympathy from the court.

Contrary to the statutes, the court below erroneously held that plaintiff did not acquire any vested rights and that the Amended Plan was not retroactive.

The Second Circuit also commented about an unimportant item that had nothing to do with the applicable law, stating that plaintiff did collect under her husband's group term policy. This statement had nothing whatever to do with the important facts in this case and the law pertaining thereto. The group policy was paid by an insurance company because premiums were

also paid by plaintiff's husband and the moneys became due by reason of his death. We fail to see the relevancy or applicability of the payment of the life policy of insurance in respect to any determination whether plaintiff is entitled to the pension benefits under the Amended Pension Plan.

The United States Court of Appeals also failed to follow the authoritative decision by the Supreme Court of the United States in the case of State Farm Ins. Co. v. Duel, 324 U.S. 154, 162.

II.

THE DECISION BELOW IS CONTRARY TO THE RULE OF LAW APPLICABLE HEREIN THAT NEITHER RES JUDICATA NOR COLLATERAL ESTOPPEL APPLIES

The action in Supreme Court, Kings County, resulted in a judgment in favor of the defendant on March 1, 1977 by reason, among

other things, that the provisions of ERISA did not apply. Thereafter, Lane Bryant, Inc., by its Board of Directors, decided to come under the provisions of ERISA and by Resolution of the said Board of Directors, an Amended Pension Plan was submitted to comply with the provisions of the Internal Revenue Code and the provisions of ERISA.

At the time of the first action, namely, the Supreme Court action, the provisions of ERISA did not apply. At the time that the instant action was commenced, the provisions of ERISA and the Internal Revenue Code were duly adopted by Lane Bryant, Inc., which created new rights in favor of the plaintiff, by the voluntary act of Lane Bryant, Inc. and the favorable provisions of ERISA which referred to the vested rights of Daniel Haas and the plaintiff and made all the provisions thereof retroactive. Under these circumstances, the law is well settled that

defenses of res judicata or collateral estoppel are inapplicable.

In State Farm Ins. Co. v. Duel, 324 U.S. 154, 162, it was held:

> "* * * it is nevertheless the general rule that res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation. 2 Freeman on Judgments (5th ed.1925) §713; Blair v. Commissioner, 300 U.S. 5, 9; West Coast Life Ins. Co. v. Merced Irrigation Dist., 114 F.2d 654, 662; In re Pomeroy, 51 Mont. 119, 151 P. 333; Hurd v. Albert, 214 Cal. 15, 26, 3 P.2d 545."

In Matter of Mullane v. McKenzie, 269 N.Y. 369, 373, the Court of Appeals said:

> "The law, as it then was, dictated such denial. Now he asserts a new statutory right. The earlier decision may be a conclusive adjudication of the petitioner's rights, existing then; it cannot be an adjudication of rights thereafter conferred by law, or bar a new proceeding to vindicate new rights."

See also, Utter v. Franklin, 172 U.S. 416, holding that county bonds which are void because not authorized by the legislature may be validated by a subsequent act, and that a judgment holding such bonds invalid is not res judicata as to their validity after enactment of the statute.

The decision of the courts below failed to follow the authoritative ruling by this Court in Duel and Utter, supra.

III.

THE DECISION BELOW FAILED TO NOTE THAT ERISA AND THE INTERNAL REVENUE CODE SPECIFICALLY STATE THAT A RIGHT TO AN ACCRUED BENEFIT DERIVED FROM EMPLOYER CONTRIBUTIONS SHALL NOT BE TREATED FORFEITABLE SOLELY BECAUSE THE PLAN PROVIDES THAT IT IS NOT PAYABLE IF THE PARTICIPANT DIES

The Amended Pension Plan omitted Article XII contained in the original Pension Plan, which stated that no benefits of the Pension

Plan are available to any employee or any beneficiary in case of death of such employee before he is retired.

The Congress in the enactment of ERISA and the Internal Revenue Code was undoubtedly of the opinion that such provisions were harsh and worked a hardship on employees who, after rendering service over many years, would be in danger of losing same by reason of such provision. Congress, therefore, specifically enacted into law a provision outlawing such forfeiture.

This is specifically provided for under Section 1053 (a)(3) of Title 29, U.S.C., and Section 411(a)(3) of Title 26 U.S.C., each of which read as follows:

> "A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in Section 1055 of this title)." (or as provided in Section 401(a)(11)

Therefore, Article XII of the former Pension Plan, referring to death of an employee before retirement as forfeiting his right to pension, is omitted from the Amended Pension Plan in order to comply with the aforementioned statutory sections.

IV.

THE DECISION BELOW FAILED TO NOTE THAT DANIEL HAAS, A "PARTICIPANT" OR FORMER EMPLOYEE OF LANE BRYANT, INC., HAD A VESTED NON-FORFEITABLE INTEREST TO 100% OF HIS ACCRUED BENEFITS DERIVED FROM EMPLOYER CONTRIBUTIONS

Daniel Haas had worked for Lane Bryant, Inc. for 50 years and was 65 years of age at the time he died.

Under the provisions of ERISA and the Internal Revenue Code or Income Tax Law, the term "participant" means any employee or former employee of an employer (Section 1002(7), Title 29, U.S.C.).

An employee who has at least 10 years of service for an employer or whose sum of age and service equals or exceeds 55, has a vested nonforfeitable interest to 100% of his accrued benefits derived from employer contributions (Section 1053(a)(2)(A) (B), Title 29, U.S.C.; and Section 411, Title 26, U.S.C.).

V.

THE DECISION BELOW FAILED TO NOTE THAT IN ORDER TO COMPLY WITH THE PROVISIONS OF ERISA AND THE TAX LAWS, THE AMENDED PENSION PLAN WAS MADE EFFECTIVE AS OF FEBRUARY 1, 1976, CREATING VESTED RIGHTS

The second page of the Amended Pension Plan states as follows:

> "C. Effective Date: February 1, 1976, the date which the provisions of this amended and restated Plan became effective."

The term "participant" under the Amended Plan is stated as follows:

> "F. Participant: A person or former employee who has completed a Year of Service and who: (a) *** is in employ of the Company, (b) has vested rights to an accrued benefit, or (c) is receiving Pension benefits."

Section 1082(c)(8) of Title 29, U.S.C., provides as follows:

> "For the purposes of this part, any amendment applying to a plan year which —
>
> (A) is adopted after the close of such plan year but not later than 2-1/2 months after the close of the plan year (or, in the case of a multi-employer plan, no later than 2 years after the close of such plan year).
>
> (B) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies."

To comply with ERISA, the Amended Plan was made effective as of February 1, 1976, the beginning of Lane Bryant's plan year, which was even before this 2-1/2 month period.

It is specifically provided, that "the accrued benefit of any participant de-

termined as of the beginning of the first plan year to which an amendment applies", namely in this case, as of February 1, 1976, means an accrued benefit of 50 years service of an employee who reached the age of 65 years, or in other words, 100% of the accrued benefit thereof. Such accrued benefit is not reduced in any way whatever by the adoption of the Amended Plan, as provided under the aforementioned Section 1082 of Title 29, U.S.C.

Similar provisions appear under Title 26, Section 411, U.S.C., dealing with the Income Tax Law.

VI.

THE DECISION BELOW ERRED IN FAILING TO HOLD THAT ERISA, THE INCOME TAX LAW AND THE INTERNAL REVENUE CODE ARE MADE TO APPLY RETROACTIVELY IN THE RESPECTS HEREIN NOTED

The retroactive effect which is granted in favor of plaintiff is provided for by ERISA,

the Income Tax Law and the Internal Revenue Code, as specifically provided for by Section 1053(a)(3)(C) of Title 29, U.S.C., which reads as follows:

> "(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(c)(8) of this title." (supra)

S similar provision appears in the Income Tax law, Section 411(a)(3)(C), Title 26, U.S.C., which reads as follows:

> "(C) Effect of Retroactive Plan Amendments. A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in Section 412 (c)(8)."

The claim made by the defendant that the statutes are prospective and not retroactive, therefore, falls of its own weight. It is respectfully submitted that Judge Lasker and

the Second Circuit erred in deciding that Congress did not intend a retroactive application in respect to the facts at bar (Appendix 1a; R.A. 178).

VII.

THE COURT BELOW ERRED IN HOLDING THAT THE AMENDED PLAN EXPRESSLY PROVIDED THAT IT IS PROSPECTIVE

The defendant in its arguments claimed that the vesting schedules provided for by statutues did not apply since the Amended Plan provides that the provisions apply to a participant who terminates his employment or retires after the effective date of February 1, 1976 R.A-124. The court below apparently adopted this argument and erroneously held that the Amended Plan was prospective.

The foregoing provision in the Amended Plan is violative of the provisions of the statutes, and the participant, or the plaintiff

in this action, would be permitted, for example, by this action, to have his or her nonforfeitable percentage computed under the Plan without regard to such amendment.

In respect to the foregoing, please note §1053(c(1)(A) and (B), Title 29, U.S.C.; also §411, Title 26, U.S.C., supra p.12-13.

Plaintiff comes within the definition of "participant" under the provisions of ERISA and under the provisions of the Amended Plan defining a "participant", as

> "F. Participant: A person or former employee who has completed a year of service and who: * * *(b) has vested rights to an accrued benefit, * * *"
> (R.A-125)

VIII.

THE COURT BELOW FAILED TO NOTE THAT THE ADOPTION OF THE FURTHER AMENDMENT TO LANE BRYANT'S PENSION PLAN, APPROVED BY THE INTERNAL REVENUE SERVICE ON NOVEMBER 9, 1978 AND EFFECTIVE AS OF DECEMBER 1, 1978 (R.A-90;A-172) CREATED GREATER RIGHTS IN FAVOR OF PLAINTIFF

This additional amendment (R.A-90;A-172) grants "additional benefit for certain participants who retired prior to February 1, 1977". These additional benefits are up to 40% in addition to the retirement benefits. In this case, since Daniel Haas retired prior to February 1, 1977, he is entitled to an additional benefit of 40%, or a total sum of $93,074.50, which was sought by way of summary judgment.

In this connection, it is also important to note that Exhibit C annexed to defendant's moving papers (R.A-92) is a letter from the District Director of Internal Revenue Service,

which states as follows:

> "This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other Federal or local statutes." (R.A-92)

IX.

THIS ACTION HAS MERIT AND THE REVERSAL OF THE COURT BELOW AND THE GRANTING OF SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF REMEDIES AN UNJUST AND HARSH POSITION TAKEN BY DEFENDANT AND LANE BRYANT, INC., WHICH IS CONTRARY TO ERISA, THE INTERNAL REVENUE CODE, THE TAX LAWS AND THE DECLARATIONS OF CONGRES SIONAL POLICY AND ITS FINDINGS

Congress made certain findings and declared its policy in the enactment of ERISA and related statutes which found harsh and unjust provisions in pension plans and required employers "to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance".

Congress had a definite purpose in enacting the remedial legislation set forth in ERISA, as appears from the Reports of the various Committees of Congress set forth in U. S. Code Congressional and Administrative News, pages 4093-6372.

For example, on page 4643, it is stated:

> "* * * Thus, under present law, accumulated pension credits can be lost even when separated employees are within a few months, or even days, of qualifying for retirement.
>
> The proposed bill would, therefore, establish minimum standards of vesting, funding, and fiduciary and a system of compulsory benefit insurance to protect the security of pension rights.
>
> As suggested by the President's Cabinet Committee Report of 1965; 'As a matter of equity and fair treatment an employee covered by a pension plan is entitled, after a reasonable period of service, to protection of his future retirement benefit against any termination of his employment' "

It is respectfully submitted that an employee who performed 50 years of service for the company should not be penalized, nor his beneficiary penalized, by the fact that he died about 2-1/2 months before his retirement date. Pension benefits are not to be decided by a mere gamble. Congress has specifically stated that death is no criteria in determining the right to pension benefits.

* * * * * * *

In arguments before the Court of Appeals respondent raised the point that since the plan administrator made no election to come under the provisions of ERISA, there could be no retroactive application. This reasoning is erroneous since the Amended Plan was adopted by the Board of Directors of Lane Bryant, Inc. In support of its position, respondent cited the

case of Riley v. Meba Pension Trust, 570 F.2d 406, 411 (2 Cir., 1977).

In Riley, the court dealt with a situation respecting a plan in existence on January 1, 1974, wherein the vesting provisions did not apply since they were applicable to plan years beginning after December 31, 1975 [29 U.S.C. §1061(b)(2)].

In the case at bar, the vesting provisions became applicable to Daniel Haas, the participant of the Amended Pension Plan.

As a matter of fact, in Riley, supra, the court realized that a factual situation may arise in the future as set forth herein, wherein it would be "shocking" to deny a pension where it "would be contrary to the vesting provisions even though it preceded the effective date of the latter" (ERISA).

The court, at page 413 in Riley

(570 F.2d 406) supra, stated:

> "We need not decide whether in some truly shocking case a court might properly condemn the denial of a pension that would not have been arbitrary or capricious or in violation of any specific fiduciary provision of ERISA but would be contrary to the vesting provisions even though it preceded the effective date of the latter. Almost by definition such cases will rarely arise. This surely is not one of them, and Riley is not entitled to relief for any period before the vesting provisions became effective as to him."

CONCLUSION

On February 1, 1976 the vesting provisions of ERISA were made applicable in respect to all pension plans which complied with the provisions of ERISA. The first page of the Amended Plan of Lane Bryant, Inc., states as follows:

> "The Plan and Trust are intended to meet the requirements of Sections 401(a) and 501(a) of the Internal Revenue Code of 1954, as amended by the Employee Retire-

ment Income Security Act of 1974 ("ERISA")." (R.A-124)

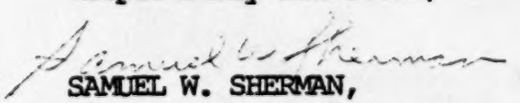
It is, therefore, apparent and cannot be disputed that the Amended Pension Plan intended to come within the provisions of the Internal Revenue Code providing for an exemption of taxation as to the pension trust or moneys and intended also to comply with the provisions of ERISA. This was a voluntary act on the part of Lane Bryant, Inc. and the Trustees of the Pension Plan, by which it is bound and in which new rights were created in favor of the plaintiff. Had it not filed its Amended Plan and obtained the approval of the Internal Revenue Service, it would not have been exempt from taxation and it would not have complied with ERISA, and new rights might not have arisen in favor of the plaintiff.

This Honorable Court should, therefore, issue a writ of certiorari to review the

judgment and opinion of the court below which is in conflict with the decisions of the United States Supreme Court and which is contrary to the intent and clear language of Congress in the enactment of ERISA, which are clearly made to apply retroactively in factual situations such as are presented in the case at bar.

For these reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,



SAMUEL W. SHERMAN,
Attorney for Petitioner.

JUDGMENT OF THE UNITED STATES
COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of December one thousand nine hundred and seventy-nine.

Present: HON. STERRY R. WATERMAN
HON. LEONARD P. MOORE
HON. WALTER R. MANSFIELD

Circuit Judges,

SHIRLEY HASS, individually and as Executrix under the Last Will and Testament of Daniel Hass Deceased, Plaintiff-Appellant, v. MANUFACTURERS HANOVER TRUST CO., as Trustee of the Pension Fund of Lane Bryant, Inc., Defendant-Appellee.	79-7487

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the Court's oral opinion in open court with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

/s/ Arthur Heller

BY: Arthur Heller,
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
DEC 3 1979
A. DANIEL FUSARO, CLERK

ORAL OPINION OF THE UNITED STATES
COURT OF APPEALS, SECOND CIRCUIT

(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases.)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
- x

SHIRLEY HAAS, individually and as Executrix under the Last Will and Testament of Daniel Haas, deceased,

Plaintiff-Appellant,

-against- Dkt. No. 79-7487

MANUFACTURERS HANOVER TRUST CO., as Trustee of the Pension Fund of Lane Bryant, Inc.,

Defendants-Appellants. (sic)

- x

Before:

HON. STERRY R. WATERMAN, HON. LEONARD P. MOORE, and HON. WALTER R. MANSFIELD, Circuit Judges.

New York, NY
December 3, 1979

- -
Statement made by the court at disposition of appeal in open court.
- -

JUDGE MANSFIELD:

Well, gentlemen, we studied your briefs and we reviewed them and the record and, Mr. Sherman, you do have a client who was most unfortunate because of the timing involved. On the other hand, we've studied the plans, we've studied the statutes to which you referred, and we cannot agree with your position.

We've just discussed the case and passed notes between ourselves here. We are satisfied that the order of the District Court for the Southern District of New York which granted summary judgment dismissing the complaint must be affirmed, substantially for the reasons that were stated by Judge Lasker in his July 2, 1979, opinion.

The New York State Supreme Court's adjudication of plaintiff's claim bars her assertion of it here. Since her husband died on November 17, 1975, and the Employers Retirement Income Security Act of 1974 did not become applicable, at least to the Lane Bryant plan, until February 1, 1976, the plaintiff acquired no vested interest in or right to any accrued rights under the plan. The plan itself, moreover, expressly provided that no such rights existed. The plaintiff, incidentally, did collect on his group term life policy. The Lane Bryant plan as amended on February 1, 1976, was not retroactive, absent a written election by Lane Bryant under §1017(d) of ERISA to make it so. On the contrary the plan expressly provided that it is prospective.

None of the statutes that you have cited to us in our view render the plan retroactive.

We believe that Lane Bryant was not a multi-employer within the meaning of the Sections to which you referred and we believe that, unfortunately for Mr. Haas, he did not acquire any vested interest at the time of his death.

We affirm because we believe that the decision of Judge Lasker adequately covers the reasoning involved and that nothing of precedential value would be served by writing an opinion.

Thank you.

OPINION AND ORDER OF THE
DISTRICT COURT (LASKER, D.J.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

SHIRLEY HAAS, individually and as Executrix under the Last Will and Testament of DANIEL HAAS, Deceased,

Plaintiff,

-against-

78 Civ. 4915 (MEL)

MANUFACTURERS HANOVER TRUST CO., as Trustees of the Pension Fund of LANE BRYANT, INC.,

Defendant.

----------x

APPEARANCES:

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New York, New York 10017
Attorney for Plaintiff

D'AMATO & LYNCH, ESQS.
70 Pine Street
New York, New York 10005
Attorneys for Defendant

LASKER, D.J.

Shirley Haas, the widow and executrix of Daniel Haas, commenced this action to recover benefits allegedly due her under her husband's employer's pension plan. The defendant moves for summary judgment dismissing the complaint, and Ms. Haas cross-moves for summary judgment awarding her the relief requested in her complaint.

In 1942, Lane Bryant, Inc. established a pension plan for its employees. In 1975, pursuant to the terms of the plan then in effect, Daniel Haas, who was scheduled to retire on January 31, 1976, elected to receive a reduced lifetime pension in return for a guarantee that he would receive at least an actuarily determined sum of $66,476.50. In the event he died after retiring but before receiving this sum, the remainder was to be paid to his wife.

However, Haas died on November 17, 1975, before he retired from Lane Bryant. At the time, Article XII of the pension plan provided:

> "No benefits of the pension plan shall be available to any employee or to any designated beneficiary ... , in case of termination of service or death of such employee before the employee has retired."

Accordingly, when Haas' widow sought to collect from the pension plan, the Trustees of the plan refused payment. 1/

Ms. Haas sued the Trustees in New York Supreme Court, alleging, inter alia, that section 203(a)(3)(A) of the Employee Retirement Income Security Act of 1974 (ERISA) applied to Lane Bryant's pension plan at the time her husband died. Section 203(a)(3)(A) provides:

> "A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies ...."

29 U.S.C. § 1053(a)(3)(A). Under this provision of ERISA, Ms. Haas argued, Article XII of the pension plan was void, and accordingly she was entitled to receive benefits under the plan. Justice Brownstein held that:

> "The plaintiff's second cause, which relies on the Employment Retirement Income Security Act of 1974 ['ERISA'], does not state a cause of action, since 'ERISA' is not applicable to the 'Plan.' U.S.C.A. Title 29, section 1061[2][2], provides that where a plan was in existence on January 1, 1974, as was the case with the Lane Bryant Plan, the application of 'ERISA' is deferred to 'Plan' years beginning after December 31, 1975. (Lane Bryant's 'ERISA' Plan year began February 1, 1976.) As plaintiff's decedent had died on November 17, 1975, before retirement and before 'ERISA' became applicable, his beneficiary acquired no vested right to accrued benefits."

Haas v. Malsin, No. 18478/76, slip op. at 3-4 (Sup. Ct. Kings Co. January 26, 1977) (The Appellate Division, Second Department affirmed Justice Brownstein's decision, and leave to appeal to the New York Court of Appeals was

denied).

It is undisputed that Justice Brownstein's hold is res judicata here. However, as required under ERISA, Lane Bryant amended its pension plan effective February 1, 1975, to conform with the Act. Ms. Haas subsequently commenced this action in federal court, contending that by amending its plan to conform to ERISA, Lane Bryant caused the provisions of ERISA to become effective with regard to its plan for periods prior to February 1, 1976. (She also asserts that subsequent amendments are retroactively effective to periods prior to February 1, 1976, and seeks increased benefits based on such amendments. Thus, Ms. Haas argues, by amending its plan Lane Bryant made the provisions of ERISA retroactively applicable at the time her husband died, rendering Article XII of the pre-amended plan void, and thereby

breathing life into her claim for pension benefits under the plan.

Article I of Lane Bryant's amended plan expressly provides that the amended plan became effective February 1, 1976, and that:

> "The provisions of this [amended] Plan shall apply only to a Participant who terminates employment or retires on or after the Effective Date. The rights and benefits, if any, of a former participant shall be determined in accordance with the prior provisions of the Plan in effect on the date his employment terminated or he retired."

Clearly Lane Bryant did not intend its amended plan to have retroactive effect. In support of her argument that because the plan was amended ERISA applies to it retroactively, Ms. Haas cites various provisions of ERISA, to wit, 29 U.S.C. §§ 1002(6), 1053(a)(2)(A), 1053(a)(3), 1053(c)(1)(A), 1053(c)(1)(B), 1082(c)(8). However, a reading of the cited provisions suggests no conceivable argument in support of the plaintiff's

position. Nothing suggests that Congress intended that ERISA's provisions were to become retroactively effective as soon as a pension plan was amended to conform to ERISA's requirements.

For the reasons stated, plaintiff's motion for summary judgment is denied, and defendant's motion for summary judgment dismissing this action is granted.

It is so ordered.

Dated: New York, New York
July 2, 1979

/s/ Morris E. Lasker
U. S. D. J.

FOOTNOTE

1. Since Haas was a full-time employee of Lane Bryant at the time he died, he was covered by the company's group term life insurance. Ms. Haas received $106,249.50 under the company's policy.

79-1264

Supreme Court, U. S.
FILED
MAR 17 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979
No.

SHIRLEY HAAS, individually and as Executrix under the Last Will and Testament of DANIEL HAAS, Deceased,

Petitioner,

vs.

MANUFACTURERS HANOVER TRUST CO., as Trustee of the Pension Fund of LANE BRYANT, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

SHIRLEY HAAS, individually and as Executrix under the Last Will and Testament of DANIEL HAAS, Deceased,

Petitioner,

vs.

MANUFACTURERS HANOVER TRUST CO., as Trustee of the Pension Fund of LANE BRYANT, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

D'AMATO & LYNCH
Attorneys for Respondent
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QUESTION PRESENTED

1. Whether the Second Circuit Court of Appeals erred in affirming the District Court's holding that the filing of Amendments to Lane Bryant's Pension Plan did not make the amended Plan apply retroactively to the Petitioner's decedent?

STATEMENT OF THE CASE

In the Spring of 1979, the Petitioner filed the Complaint in the instant action in the United States District Court for the Southern District of New York. The Respondent moved to summarily dismiss the Complaint. The Honorable Morris E. Lasker on July 2, 1979 summarily dismissed the Complaint. Thereafter the Petitioner appealed the decision of Judge Lasker to the United States Second Circuit Court of Appeals. On December 3, 1979 after oral argument before it, the Court of Appeals affirmed the decision of Judge Lasker from the bench. The instant Petition seeks a Writ of Certiorari from the Supreme Court of the United States to the Court of Appeals.

STATEMENT OF FACTS

The Petitioner, Shirley Haas, is the widow of Daniel Haas, and Executrix of his Estate. The Petitioner's decedent was employed full-time until his death on November 17, 1975 by Lane Bryant, Inc. ("Lane Bryant"), a retailer of women's clothing.

The Respondent, Manufacturers Hanover Trust Company is, and has been since January of 1976, the Trustee of the Pension Fund of Lane Bryant, (the "Pension Fund"). The Pension Fund has been in continuous existence from 1942 to date.

The Petitioner's decedent, who was being paid at the rate of $34,500 per annum in 1975, was required by Lane Bryant's personnel policy to retire at the end of the semi-annual fiscal period in which he became sixty-five years of age. In the case of the Petitioner's decedent, the last day that he could be a full-time employee was January 31, 1976. The Petitioner's

decedent chose the last possible day on which to retire, i.e., January 31, 1976, and he also chose as a form of pension to be paid to him when he did retire, the "Optional Method". Under this Optional Method, a guaranteed amount of pension payments would be made to the pensioner, or his named beneficiary, after the retirement of the employee. Because of his considerable service for Lane Bryant, the Petitioner's decedent could have retired and commenced receiving pension benefits at anytime after his sixtieth birthday. The Petitioner's decedent, however, chose to remain a full-time employee and enjoy the benefits of his considerable salary, as well as group term life insurance and other fringe benefits, for as long as possible. When the Petitioner's decedent died on November 17, 1975, he was still a full-time employee, and the Petitioner did not receive any part of the Optional Method of pension, which Petitioner's decedent had chosen, because the Petitioner's

decedent had died prior to his retirement date and while a full-time employee. Although the Petitioner did not receive the pension which she is now seeking to recover, in the amount of $66,476.50, she did receive $106,249.50 under Lane Bryant's group term life insurance policy. (See, footnote 1 of Judge Lasker's decision) (13a). A substantial portion of the premium for that life insurance was paid by Lane Bryant and such payment by Lane Bryant would terminate on an employee's retirement.

In July of 1976, the Petitioner commenced suit in the Supreme Court of the State of New York, Kings County, against the Trustees of the Pension Fund, to recover the pension allegedly due the Appellant. (A-37)*

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*("A" refers to the Appendix on appeal before the Second Circuit Court of Appeals.)

In January of 1977, the Honorable Irwin Brownstein, on the Respondent's Motion for summary judgment, dismissed the Petitioner's Complaint. (A-46)

Thereafter, the Petitioner appealed Justice Brownstein's decision, to the New York State Appellate Division, Second Department. The Appellate Division unanimously affirmed Justice Brownstein's decision. Requests by the Petitioner for leave to re-argue, or for permission to appeal to the New York Court of Appeals, were denied by both the Appellate Division, Second Department, and the Court of Appeals.

The Petitioner's Complaint before the New York Supreme Court alleged as one of its Causes of Action that the Employees' Retirement Income Security Act of 1974 ("ERISA") applied to Lane Bryant's Pension Plan, and, therefore, the Petitioner was entitled to the pension selected by the Petitioner's decedent. (A-38,44).

Justice Brownstein held that November 17, 1975, the date of the Petitioner's decedent's death, was the date on which his and the Petitioner's rights were to be determined. Justice Brownstein found that on November 17, 1975, ERISA, by its own provisions, was not applicable to Lane Bryant's Pension Plan and since the Petitioner's decedent was a full-time employee of Lane Bryant on that date, by the terms of Lane Bryant's Pension Plan (Article 12), the Petitioner was not entitled to the pension the Petitioner's decedent had chosen to be paid commencing when he retired. (A-46-50).

Since Lane Bryant's Pension Plan was in existence before January 1, 1974, ERISA required that Lane Bryant's Pension Plan be amended to conform with the sections of the Internal Revenue Code added or amended by ERISA, no later than the first day of the Plan's fiscal year commencing after December 31, 1975 (i.e., February 1, 1976). (A-93-95). In

order to make the Plan conform, the Board of Directors of Lane Bryant adopted an Amended Pension Plan in December of 1976, which in February of 1977 was submitted to the Internal Revenue Service for its approval. This Amended Plan was stated to be effective as of February 1, 1976 and was designed to make the Plan's provisions conform with the Internal Revenue Code as amended by ERISA. (A-58-88). The Amended Plan was approved by the Internal Revenue Service as conforming with the Internal Revenue Code as amended by ERISA in May of 1977. (A-92).

Lane Bryant's Board of Directors has, subsequent to February of 1977, adopted other amendments to the Pension Plan, which by their expressed terms, became effective commencing on the date of approval by the Internal Revenue Service, and which would affect persons who were, at the time of the amendments became effective, participants in the Pension Plan.

None of these later amendments were required for Lane Bryant's Pension Plan to comply with the Internal Revenue Code as amended by ERISA.

Thereafter, in 1979 the Petitioner filed the instant Complaint in the United States District Court for the Southern District of New York. The Complaint alleged that by reason of one or more of the amendments to Lane Bryant's Pension Plan, the Plan as amended, somehow should be applied retroactively to November 17, 1975, the date of the Petitioner's decedent's death, resulting in the Petitioner being entitled to the pension selected by Petitioner's decedent.

ARGUMENT

POINT I

THE PRIOR STATE COURT ADJUDICATION IS RES JUDICATA OF THE APPELLANT'S CLAIM.

The state court decision is res judicata as to the fact that November 17, 1975, the date of death of Petitioner's decedent is the date for determining Petitioner's rights under Lane Bryant's Pension Plan.

It is beyond dispute that Congress did not make the provisions of ERISA retroactive so as to entitle the Petitioner to benefits under Lane Bryants, Pension Plan. Riley v. Meba Pension Trust, 570 F.2d 406, 411 (2d Cir. 1977); Schlansky v. United Merchants & Manufacturers, Inc.,443 F.Supp. 1054, 1064 (S.D.N.Y. 1977).

The retroactivity of the provisions of ERISA was before the State Court in the Petitioner's prior related action. There the Court held:

> "The plaintiff's second cause, which relies on the Employment Retirement Income Security Act of 1974 ("ERISA"), does not state a cause of action, since ERISA is not applicable to the Plan. U.S.C.A. Title 29, Section 1061(b)(2), provides that where a plan was in existence on January 1, 1974, as was the case with the Lane Bryant Plan, the application of ERISA is deferred to Plan years beginning after December 31, 1975. (Lane Bryant's ERISA plan year began February 1, 1976). As plaintiff's decedent had died on November 17, 1975, before retirement and before ERISA became applicable, his beneficiary acquired no vested right to accrued benefits." (A-48-49).

Congress in enacting ERISA expressly provided for the effective date of the statute existing pension plans. 29 U.S.C. Section 1061(b)(2) provides:

> "...(i)n the case of a plan in existence on January 1, 1974, this part shall apply in the case of plan years beginning after December 31, 1975." (A-93).

The provisions of the Plan as amended to conform with ERISA are inapplicable to the Petitioner's decedent, because his employment

terminated prior to the effective date of ERISA to the Plan. Fremont v. McGraw-Edison Co., 606 F.2d 752 (7th Cir. Sept. 27, 1979). In Fremont, an employee who terminated his employment on December 31, 1975 the day before the effective date of ERISA to his employer's pension plan was denied a pension. Had he terminated his employment in 1976 he would have received a pension. Id. Similarly, in Schlansky, supra, where the Plaintiff employee was terminated on August 31, 1975, and the effective date of ERISA to the plan was July 1, 1976, Judge Werker held:

> "Plaintiff was discharged on August 31, 1975, almost a full year before the vesting provisions became effective. I will not take a statute into which Congress deliberately and carefully incorporated delayed effective dates and apply it retroactively. Keller v. Graphic Systems of Akron, Inc., 422 F.Supp. at 1009. Count V is accordingly dismissed for failure to state a claim upon which relief may be granted since I find no violation of ERISA's vesting provisions under 29 U.S.C. Section 1053 in this case."

Likewise, Judge Lasker in dismissing the Complaint in the instant action pointed out:

> "Nothing suggests that Congress intended that ERISA's provisions were to become retroactively effective as soon as a pension plan was amended to conform to ERISA's requirements." (A-178).

Thus, it is beyond peradventure that the provisions of the Plan as amended to conform with ERISA are inapplicable to the Petitioner's decedent and the prior state court adjudication denying the Appellant a pension is res judicata of the Appellant's claim.*

---

*In addition, the prior state court adjudication is res judicata of the fairness of Lane Bryant's Pension Plan. However the fairness of the Plan was not an issue before the District Court or the Court of Appeals. Rather, in the instant federal action the Petitioner has based her claim upon an amendment(s) to the Plan promulgated subsequent to the prior state court adjudication.

POINT II

THE ONLY WAY THE PROVISIONS OF ERISA COULD APPLY RETROACTIVELY TO THE APPELLANT'S DECEDENT IS IF LANE BRYANT'S PLAN ADMINISTRATOR MADE AN ELECTION PURSUANT TO SECTION 1017(d) OF ERISA AND THE PLAN ADMINISTRATOR MADE NO SUCH ELECTION.

Section 1017(d) of ERISA provided:

> Existing plans may elect new provisions.---In the case of a plan in existence on January 1, 1974, the provisions of the Internal Revenue Code...shall apply in the case of the plan year (which begins after the date of the enactment of this Act (September 2, 1974) but before the applicable effective date determined under subsection (b)...) selected by the plan administrator and to all subsequent plan years, if the plan administrator elects (in such manner and at such time as the Secretary of the Treasury or his delegate shall be regulations prescribe) to have such provisions so apply. (A-97).

See, also, Section 211(d) of ERISA, 29 U.S.C. Section 1061(d).

The Internal Revenue Regulation Section 1.410(d) promulgated by the Internal Revenue Service pursuant to Section 1017(d) of ERISA,

provided:

> (d) Certain existing plans may elect new provisions--(1) In general. The plan administrator... of a plan that was in existence on January 1, 1974 may elect to have the provisions of (ERISA)...apply to a plan year selected by the plan administrator which begins after September 2, 1974 but before the otherwise applicable effective date determined under Section 1017(b) ...of ERISA...
>
> (3) Procedure and time for making election. An election under this paragraph shall be made by attaching a statement to either the annual (tax information) return...which is filed for the first plan year for which the election is effective or to a written request for a determination letter relating to the qualification of the plan under (ERISA)...The statement shall indicate that the election made under Section 1017(d) (of ERISA) and the first plan year for which the election is effective. (A-98).

In order for Lane Bryant's plan administrator to elect to make the provisions of the Plan apply retroactively to the plan year within which the Petitioner's decedent died, the plan administrator was required under Rev. Reg. Sec. 1.410(d)(3) to file an election

complying with the following requisite elements:

> (1) The administrator must file a written election;
>
> (2) The election must be contained in either (a) the annual return required under Section 6058(a) of the Internal Revenue Code or a request to the Internal Revenue Service for a determination letter;
>
> (3) The election must indicate that it is made under Section 1017(d) of ERISA; and
>
> (4) The election must state the first plan year for which the election is effective.

It is beyond dispute that the plan administrator of Lane Bryant's Pension Plan did not perform any of the requisite elements of Rev. Reg. Sec. 1.410(d)(3). No election was filed in any return or request for a determination letter submitted by the administrator of the Pension Plan to the Internal Revenue Service. The Plan administrator never made any reference to an election under Section 1017(d) in any return or request for a determination letter. Nor did the plan administrator ever state that the first plan year as to which Amendments to the Plan were effective, was February 1, 1975 the plan year within which the Petitioner's decedent died.

On the contrary, the Plan as amended and approved by the Internal Revenue Service provided:

> "The Plan has been subsequently amended on occasion and effective as of February 1, 1976, the Company adopted and amended and restated Plan, as set forth herein. (emphasis added.)
>
> The Trust Indenture dated November 27, 1942 was amended and restated as of January 31, 1976 and is intended to form a part of the Plan. (emphasis added.)
>
> The Plan and Trust are intended to meet the requirements of Sections 401(a) and 501(a) of the Internal Revenue Code of 1954, as amended by the Employee Retirement Income Security Act of 1974 (ERISA").
>
> The provisions of this Plan shall apply only to a Participant who terminates employment or retires on or after the Effective Date.

> The rights and benefits, if any, of former participants shall be determined in accordance with the prior provisions of the Plan in effect on the date his employment terminated or he retired." (emphasis added.) (A-100).

Thus, it is beyond peradventure that the Trustees and Plan Administrator never intended to, nor did they ever make, an election under Rev. Reg. Sec. 1.410(d). And the Plan as amended had no retroactive application to increase the rights of the Petitioner or Petitioner's decedent under the Plan.

POINT III

NEITHER ERISA NOR THE INTERNAL REVENUE CODE REQUIRE THEIR PROVISIONS APPLY RETROACTIVELY

In Point VI of the Petitioner's Petition, certain sections of the Labor Laws and of the Internal Revenue Code are cited and quoted to the effect that these laws have retroactive effect. A reading of the cited sections clearly show otherwise.

Those sections discuss the right of a plan administrator to amend a pension plan retroactively to an earlier plan year. They do not make the laws themselves apply retroactively. Section 1082(c)(8)(A) of Title 29 U.S.C. reads as follows:

> "For purposes of this part, any amendment applying to a plan year which is adopted after the close of such plan year but no later than 2-1/2 months after the close of the plan year (or, in the case of a multiemployer plan,

no later than 2 years after the close of such plan year..."*

Thus, any amendment to have retroactive effect must under Section 1082(c)(8)(A) have been adopted within 2-1/2 months of the end of the plan year to which it applies. No amendment of Lane Bryant's Pension Plan

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*In addition, Lane Bryant, and its wholly-owned Subsidiaries, are by definition "one employer". Subparagraph 37(A) of Section 3 of ERISA defines the term multiemployer plan". This is found in Section 1002 (37)(A) of Title 29 U.S.C. which provides in part, as follows, in 1002 (37)(B)(ii):

> "ii. all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a) of Title 26, determined without regard to section 1563(e)(3)(C) of Title 26) shall be deemed to be on employer."

Lane Bryant's Subsidiaries, are all wholly-owned by the parent Delaware corporation. Lane Bryant meets the definition of a Parent-Subsidiary controlled group in Section 1563(a)(1) of Title 26 U.S.C.

was made or adopted until December of 1976 which is more than ten months after the end of the plan year in which Petitioner's decedent died (which was the plan year ended January 31, 1976).

Similarly, Section 412(c)(8) of the Internal Revenue Code provides the manner in which permitted retroactive amendments can be made to pension plans under the tax laws. The language of Section 412(c)(8) is substantially the same as that quoted above from the Labor Laws. Thus, there could be no retroactive application of Lane Bryant's Amended Pension Plan to the plan year in which Petitioner's decedent died under either Section 1053(a)(3)(C) of Title 29 U.S.C. or Section 411(a)(3)(C) of Title 26 U.S.C. The Petitioner's argument and reasoning on this Point is without merit.

POINT IV

PETITIONER HAS CLEARLY MISINTERPRETED THE PROVISIONS OF ERISA.

Petitioner claims that Section 1053(a)(3) of Title 29 U.S.C. required that Lane Bryant's Amended Pension Plan effective February 1, 1976, conform to ERISA and therefore not contain a provision allowing forfeiture of vested pension rights for death during employment. This interpretation is contrary to a plain reading of the cited statute which says that a plan can provide that no pension is payable if a vested participant dies while a full-time employee and the employee's vested rights will still be considered non-forfeitable. Lane Bryant's Amended Pension Plan does, in fact, contain a provision similar to the old Article XII. This is Section 6.2 of the present Plan, which has been approved by the Internal Revenue Service and which reads as follows:

> "6.2 No benefits of the Plan shall be available to any Participant, or to any beneficiary designated under the Optional Method or to the Eligible Spouse of a Participant, in case of the death of such Participant before the Participant has retired pursuant to this Plan, unless the Participant was covered under the benefits provided by Section 5.3."

Section 5.3 of the Plan provides for joint and survivor annuity coverage of Participants for periods prior to retirement.

ERISA and both the Tax laws (Title 26) and the Labor Law (Title 29) thus, do, in fact, allow a plan to provide that no pension benefits are payable if a vested Participant dies while a full-time employee. Congress knew that these persons would be covered by other employer benefits as Petitioner's decedent was in this situation.

CONCLUSION

The Petitioner Shirley Haas' Petition for a Writ of Certiorari should be denied in all respects and the decision and Order of the United States Second Circuit Court of Appeals should be affirmed in all respects.

Respectfully submitted,

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